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11 **UNITED STATES DISTRICT COURT**

12 **CENTRAL DISTRICT OF CALIFORNIA**

13 AMANDA HILL; and GAYLE HYDE,
14 Individually and On Behalf of All Others
15 Similarly Situated,

16 Plaintiffs,

17 v.

18 QUICKEN LOANS INC.,

19 Defendant.

20 Case No. 5:19-cv-00163-FMO-SP

21 **PLAINTIFF AMANDA HILL'S
EVIDENTIARY OBJECTIONS TO
THE M. Viner DECLARATION
AND ACCOMPANYING EXHIBIT
1 FILED IN SUPPORT OF
DEFENDANT QUICKEN LOANS
INC.'S REPLY TO THE MOTION
TO COMPEL ARBITRATION**

22 Pursuant to the Court's scheduling order (ECF No. 33) and Federal Rule of Civil
23 Procedure 56(c),¹ Plaintiff Amanda Hill hereby objects to the supplemental declaration
24 of Mitchell Viner (ECF No. 44-1) and the accompanying evidence attached as Exhibit
25 thereto (ECF No. 44-2) – evidence which defendant Quicken Loans Inc. (“Quicken”)
26 submitted for the first time on reply in support of its pending motion to compel
27 individual arbitration of Plaintiff Hill's claims (ECF No. 29 (the “Motion to Compel
28 Arbitration”)).

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30 ¹ Motions to compel arbitration are subject to the same evidentiary standards as
31 motions for summary judgment under Rule 56. See *Alvarez v. T-Mobile USA, Inc.*,
32 2011 WL 6702424, at *3 (E.D. Cal. 2004).

1 **I. THE COURT SHOULD NOT CONSIDER QUICKEN’S UNTIMELY,**
2 **INADMISSIBLE, AND CONTRADICTORY EVIDENCE ON REPLY**

3 On April 15, 2019, Quicken filed the Motion to Compel Arbitration, along with
4 the declaration of Mitchell Viner and various supporting materials. (ECF No. 29.) As
5 explained in Plaintiff Hill’s May 9, 2019 opposition brief, the Motion to Compel
6 Arbitration and the materials submitted in support thereof fall far short of satisfying the
7 company’s affirmative burden to demonstrate the existence of an enforceable contract
8 to arbitrate between Quicken and Plaintiff Hill. (ECF. No. 37.) Rather, the materials
9 submitted by Quicken, considered alongside the evidence accompanying Plaintiff’s
10 opposition brief, demonstrate that Plaintiff never contracted to arbitrate with Quicken
11 – or, at the very *least*, that a genuine issue of fact exists as to whether such a contract
12 was ever formed. In either case, because Quicken failed to satisfy its affirmative burden
13 to demonstrate the existence of a contract to arbitrate, the Motion to Compel Arbitration
14 must be denied. (*See generally id.*)

15 Tacitly conceding as much, Quicken has now submitted more evidence,
16 including another Viner declaration and more so-called business records (ECF Nos.
17 44-1, 44-2), along with its May 23, 2019 reply brief (ECF No. 44). Quicken’s attempt
18 to sandbag Plaintiff with these materials on reply is a procedurally improper attempt to
19 deprive Plaintiff an opportunity to respond, and it should not be permitted.
20 Substantively, Viner’s “do-over” declaration is based entirely on “information and
21 belief,” rendering it (and its accompanying materials) of no evidentiary value and
22 plainly inadmissible. Even if Viner’s declaration and the materials submitted by Viner
23 on reply are considered, they conflict irreconcilably with the materials Viner originally
24 submitted in support of the Motion to Compel Arbitration, and thus at most simply
25 submitted in support of the Motion to Compel Arbitration, and thus at most simply
26 submitted in support of the Motion to Compel Arbitration, and thus at most simply
27 submitted in support of the Motion to Compel Arbitration, and thus at most simply
28 submitted in support of the Motion to Compel Arbitration, and thus at most simply

1 further confirm the existence of a genuine issue of fact as to whether Plaintiff Hill and
2 Quicken contracted to arbitrate (they did not).
3

4 The Motion to Compel Arbitration was Quicken's chance to demonstrate the
5 existence of a contract to arbitrate with Plaintiff Hill, and the company fell far short of
6 satisfying this burden. Quicken's attempted do-over on reply is both procedurally
7 improper and substantively baseless, and its newly submitted materials should not be
8 considered by the Court in deciding the Motion.
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10 **A. Quicken's Attempt to Sandbag Plaintiff with New Evidence on
11 Reply Should be Rejected as Procedurally Improper**

12 As a threshold matter, the materials Quicken attempts to surprise Plaintiff with
13 on reply – including Viner's do-over declaration and the “records” accompanying it
14 (ECF Nos. 44-1, 44-2) – were not timely submitted and, for this reason alone, do not
15 warrant the Court’s consideration. *See, e.g., Sweet v. Pfizer*, 232 F.R.D. 360, 364 n.7
16 (C.D. Cal. 2005) (“The Court will not consider [a declaration submitted on reply], as
17 the moving party in a motion cannot submit new information as part of its Reply.”);
18 *United States v. Martinez-Leon*, 565 F. Supp. 2d 1131, 1131 (C.D. Cal. 2008)
19 (disregarding declaration submitted for first time on reply as “improperly presented
20 evidence”); *Roth v. BASF Corp.*, 2008 U.S. Dist. LEXIS 41047, 2008 WL 2148803,
21 *3 (W.D. Wash.) (“It is not acceptable legal practice to present new evidence or new
22 argument in a reply brief ...”); *Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, 308-09 n.5
23 (N.D. Cal. 2005) (“Defendants’ attempt to introduce new evidence in connection with
24 their reply papers is improper.”); *The Nautilus Group, Inc. v. Icon Health & Fitness,*
25 *Inc.*, 308 F. Supp. 2d 1208, 1214 (W.D. Wash. 2003) (striking declaration with new
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1 evidence submitted in reply); *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 682 (S.D.
2 Cal. 1999) (“It is well accepted that raising of new issues and submission of new facts
3 in reply brief is improper.”) (internal quotation marks omitted)); *United States v. Boyce*,
4 148 F. Supp. 2d 1069, 1085 (S.D. Cal. 2001) (noting that “considering arguments raised
5 for the first time in reply brief deprives opposing party of adequate opportunity to
6 respond”) (citation omitted); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996)
7 (noting that defendants may not submit “new” evidence in a reply brief without
8 affording the plaintiffs an opportunity to respond, as “[s]uch a result would be unfair.”).
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11 Because Quicken’s newly submitted evidence is untimely and offered for the
12 first time on reply, it should not be considered by the Court in deciding the Motion.

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14 **B. Viner’s Do-Over Declaration is Not Based on Personal Knowledge**
and is thus Without any Evidentiary Value

15 To the extent Viner’s “supplemental” declaration (ECF No. 44-1) is not rejected
16 as untimely, the declaration should nonetheless be held inadmissible (and given no
17 consideration) for failure to comply with 28 U.S.C. § 1746.

18 All of the facts to which Viner purports to testify in his supplemental declaration
19 are improperly qualified as being “true and correct to the best of [his] knowledge,
20 information and belief.” (*See* ECF No. 44-1 at 2; *see also id.* at 4 (stating in conclusion
21 that “I declare under penalty of perjury under the laws of the United States of America
22 that the foregoing is true and correct to the best of my knowledge, information and
23 belief”) (emphasis added).)² It is well established that the qualification of truth “to the
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26 ² It is not surprising that Mr. Viner, the general counsel of LMB OpCo, LLC,
27 personally knows nothing about the data collection, appending, and transmission
practices of one of LMB OpCo’s subsidiaries (LMB Mortgage Services, Inc.), nothing
about the practices of Quicken – the parent company of LMB Mortgage Services, Inc.

1 best of my knowledge, information and belief' is not in compliance with 28 U.S.C. §
2 1746. *Tungjunyatham v. Johanns*, No. 1:06-CV-1764-SMS, 2009 WL 3823920, at *6
3 n.3 (E.D. Cal. Nov. 13, 2009), *aff'd*, 500 F. App'x 686 (9th Cir. 2012) ("The
4 qualification of truth 'to the best of my knowledge and belief' is not in compliance
5 with 28 U.S.C. § 1746, which requires that a declaration be subscribed as true under
6 penalty of perjury, and be executed substantially in the statutory form, which in turn
7 requires a declaration 'under penalty of perjury that the foregoing is true and correct.'")
8 (quoting 28 U.S.C. § 1746); *see, e.g.*, *Cobell v. Norton*, 310 F. Supp. 2d 77, 84 (D.D.C.
9 2004) (statement of truth based on "knowledge, information, and belief" does not
10 comply with 28 U.S.C. § 1746).

11 Because Viner's supplemental declaration is not in compliance with 28 U.S.C.
12 § 1746, the declaration has no evidentiary value and should be not be considered by
13 the Court in deciding the Motion to Compel Arbitration. *E.g.*, *Columbia Pictures
Indus., Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir.
14 1991) (rejecting an affidavit because it was "not based on personal knowledge, but on
15 information and belief"), *aff'd*, 508 U.S. 49 (1993); *Weldon v. Anaya*, No.
16 115CV00856DADMJS, 2017 WL 1349005, at *2 (E.D. Cal. Apr. 6, 2017); *see also*,
17 *e.g.*, *Am. Int'l Specialty Lines Ins. Co. v. United States*, No. CV0901734AHMRZX,
18 2009 WL 10672383, at *3 (C.D. Cal. Nov. 3, 2009) (stating that "[m]any of the
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20 and the grandfather company of LMB OpCo, by whom Viner is employed – in terms
21 of how a particular consumer's lead data is handled and what other data is appended to
22 it upon Quicken's receipt of the lead data from LMB Mortgage Services, Inc.'s
23 YourVASurvey.info and LowerMyBills.com websites, and nothing about why
24 Quicken decided to begin blasting text messages to Plaintiff Hill's cell phone number
25 after the number somehow wound up in the company's possession at the end of its
26 journey through this underbelly of the data mining, appending, and trafficking industry.
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1 declarations are made ‘to the best of my knowledge’ or on ‘information and belief’ or
2 with similar statements, which renders them of little evidentiary value”) (citing *Bank*
3 *Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412-13 (9th Cir. 1995)); *Leonard Roofing, Inc.*
4 *v. Ironshore Specialty Ins. Co.*, No. EDCV1200156VAPDTBX, 2013 WL 12129653,
5 at *4–5 (C.D. Cal. Mar. 29, 2013) (“A declaration or affidavit must be based on
6 personal knowledge, and a declaration based on information and belief is insufficient
7 to meet the requirements of Rule 56 of the Federal Rules of Civil Procedure.”).
8

9 Quicken’s newly submitted Viner declaration (together with the accompanying
10 Exhibit 1) is not admissible and the Court should not consider it in deciding the Motion.
11

12 **C. The Materials Accompanying Viner’s Do-Over Declaration
13 Conflict, Irreconcilably, with the Records Originally Submitted by
14 Viner in Support of the Motion to Compel Arbitration**

15 Finally, the so-called records attached as Exhibit 1 to Viner’s supplemental
16 declaration (ECF No. 44-2) conflict, irreconcilably, with the records submitted by
17 Quicken in support of the Motion to Compel Arbitration, rendering the newly-
18 submitted “records” of dubious reliability or value, to put it charitably – and at the very
19 least confirming that a genuine issue of material fact exists with respect to the contract
20 formation question at the heart of the Motion to Compel Arbitration.

21 Together with Viner’s original declaration, Quicken submitted what it claimed
22 were business records explicitly stating that Ms. Hill accessed the subject LMB
23 websites with a “mobile device.” (*See* ECF No. 29-6 at 3; 29-7 at 3 (emphasis added).)
24 Ms. Hill cited that original evidence in support of her opposition brief, in the course of
25 demonstrating that, even if she had pressed the “See My Results!” button on the final
26 page of one of LMB’s wild-goose-chase websites (and she did not), the subject fine-
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1 print disclosure statement linking to the Terms of Use on any such page would not have
2 appeared on the screen of her mobile device without her scrolling down (which visitors
3 were not prompted to do). (*See* ECF No. 37 at 9-10, 19.)

5 Thus, the records originally submitted by Quicken in support of the Motion to
6 Compel Arbitration plainly refute Quicken's new contentions on reply that "Hill does
7 not even assert that she visited the mobile site" and that the "screenshot [depicting the
8 way in which the mobile site would have displayed to her, submitted in support of the
9 reply] is irrelevant to the question of what Hill saw on the two occasions that she visited
10 LMS's websites back in 2018." (ECF No. 44 at 17 n.8.) On the contrary, as reflected
11 in Quicken's own original evidentiary submission (and explicitly referenced in
12 Plaintiff's opposition brief), when Plaintiff accessed the subject websites on the dates
13 in question, via her Android Galaxy smartphone, she was presented with the mobile
14 version of those pages in the manner reflected in the screenshot accompanying her
15 opposition brief, with no visible disclosure statement below the button linking to the
16 Terms of Use – i.e., not in the manner depicted in the materials submitted by Quicken
17 in support of its Motion. Lest there be any doubt, consistent with her original
18 declaration, Plaintiff Hill's Corrected Declaration also attests to these irrefutable facts.
19 (*See* Corrected Declaration of A. Hill; ECF No. 48.)

20 Faced with an evidentiary record demonstrating that it totally failed to put
21 Plaintiff on fair notice of the Terms of Use, much less adequately inform her that she
22 would be bound to such terms by pressing the button (even assuming she pressed it,
23 which she did not do) – failings which are clearly dispositive on the threshold contract
24 formation question and thus fatal to its Motion to Compel Arbitration – Quicken has
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1 now completely reversed course on reply in a last-ditch effort to conform the
2 “evidence” to its litigation objectives. Indeed, Quicken has submitted, as an attachment
3 to Viner’s supplemental declaration made in support of Quicken’s reply, new “records”
4 that directly and irreconcilably conflict with the first set of business records it submitted
5 in support of the Motion to Compel Arbitration (reflecting “mobile” in the “device
6 type” field), as discussed above. These new so-called “records” submitted on reply
7 purportedly represent that no “device type” information (“n/a” to be precise) was
8 collected by LMB reflecting the type of device used by Plaintiff to access the subject
9 LMB websites on the dates in question. (*Compare* ECF No. 44-2 at 2 (“n/a” for
10 “device type”) *with* ECF No. 29-6 at 3; 29-7 at 3 (“mobile” for “device type”).) This
11 is quite frankly outrageous.

12 It appears Quicken manufactured or altered its original records in order to
13 include certain “alternative facts” in the new records capable of being used to conform
14 the company’s arguments on reply to rebut those raised by Plaintiff in her opposition.
15 Nothing else explains the irreconcilable conflict that exists between the two sets of
16 records, and the tactical way in which Quicken disavowed the original records in favor
17 of the new ones it suddenly found and submitted for the first time on reply. At best,
18 the discrepancy between the records gives rise to a genuine issue of fact on the
19 formation question, which is all the Court needs to deny the Motion to Compel
20 Arbitration. At worst, the discrepancy evidences an improper attempt by Quicken to
21 mislead the Court, in order to win this case with improper means, in which case more
22 substantial relief in Plaintiff’s favor would surely be appropriate. *See, e.g., Varela v.*
23 *Industrial Professional and Technical Workers*, 2009 WL 10670788, at *4 (C.D. Cal.
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1 2009) (admonishing “tactic” of submitting “inconsistent declarations” on reply as an
2 “attempt to mislead,” “rais[ing] serious question about [counsel’s] ethical standards”).
3 But this much is clear so far: Quicken has plainly failed to demonstrate the existence
4 of a duly-formed contract to arbitrate on this record.

5 Because Quicken’s newly submitted records directly contradict Quicken’s
6 originally submitted records, the Court should not consider the new records in deciding
7 the Motion to Compel Arbitration. At the very least, the Court should consider both
8 sets of records, conclude that the discrepancy between the records is sufficient to give
9 rise to a genuine issue of fact on the formation question, and deny the Motion to
10 Compel Arbitration on this basis.

11 **II. CONCLUSION**

12 For the foregoing reasons, the Court should sustain Plaintiff Hill’s evidentiary
13 objections and decline to consider the untimely supplemental declaration of Mitchell
14 Viner and its accompanying Exhibit 1 (ECF Nos. 44-1, 44-2) in deciding Quicken’s
15 Motion to Compel Arbitration (ECF No. 44).

16 Dated: June 6, 2019

17 Respectfully submitted,

18 **HEDIN HALL LLP**

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